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# In the Supreme Court

## of the United States

OCTOBER TERM, 1965

No. 265

COMINCO PRODUCTS, INC.,

*Petitioner,*

v.

THE OREGON STATE TAX COMMISSION,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON**

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COMINCO PRODUCTS, INC.,

*Petitioner,*

v.

THE OREGON STATE TAX COMMISSION,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON**

Cominco Products, Inc. prays that a Writ of Certiorari issue to review the Judgment and Decree of the Supreme Court of the State of Oregon, reversing and setting aside a Decree of the Oregon State Tax Court holding fertilizer imported by petitioner from Canada exempt from ad valorem personal property taxation by the State of Oregon under Article I, Sec. 10 of the Constitution of the United States of America.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon is reported at — Or. —, 411 P.2d 85, and is reprinted in Appendix A, infra, p. 1a. The decision of the Oregon Tax Court is reported in 2 O.T.R. Adv. Sh. 165, and is reprinted in Appendix A, infra, p. 11a. The administrative decision of the Oregon Tax Commission is unreported and is reprinted in Appendix A, infra, p. 16a. The administrative decision of the Sheriff and Tax Collector for Marion County, Oregon, is unreported and is reprinted in Appendix A, infra, p. 19a.

## JURISDICTION

The decree of the Supreme Court of the State of Oregon was entered on February 9, 1966 (Appendix A, infra, p. 1a). A timely petition for rehearing was denied on March 22, 1966 (Appendix B, infra, p. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

1. Does the prohibition set forth in Article I, Sec. 10 of the United States Constitution prevent a state from levying an ad valorem tax upon unsold goods in their original packages imported for sale where the goods are in the physical possession of a factor for warehousing and sale rather than the importer and owner of the same.

2. Must an "importer," as that term has been defined by this Court in construing Article I, Sec. 10 of the United States Constitution, be the "primary consignee" of the imported products in order that the prohibition of Article I, Sec. 10 of the United States Constitution apply.

3. Shall the language "in the hands of the importer," as used in the decisions of this Court over the last 133 years in interpreting Article I, Sec. 10 of the United States Constitution, be limited to imported goods in the actual physical possession of the importer.

4. Is the decision of the Supreme Court of the State of Oregon in the case at bar in conflict with the decisions of this Court and, in particular, with this Court's decision in *Low* v. *Austin,* 80 U.S. (13 Wall.) 29.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 2, of the United States Constitution provides:

> "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

## STATEMENT OF THE CASE

There is no disagreement between the parties regarding the facts. The case was heard and determined in all prior proceedings upon an agreed statement of facts. The stipulation of the parties relating to the facts is set forth in Appendix B, infra, p. 22a.

For purposes of continuity, however, the facts as set forth in the stipulation are briefly these:

Petitioner is a Washington corporation and is the importer. It purchased fertilizers in Canada from its parent Canadian corporation, The Consolidated Mining & Smelting Company of Canada, Ltd., and imports the fertilizer in bags into the United States for sale. The merchandise in dispute was shipped by petitioner to various fertilizer dealers in 17 Oregon counties pursuant to the terms of a consignment contract, and there held by said dealers for storage and sale. The pertinent aspects of the consignment contract entered into by petitioner and each of the Oregon dealers are:

(1) The dealer is to diligently seek to sell the merchandise.

(2) The dealer is to keep complete records covering consigned goods and to report each month's sales to petitioner on or before the 5th day of the following month. Petitioner is thereupon to bill the dealer for the previous month's sales at petitioner's price to the dealer at the time of each sale.

(3) The dealer agrees to keep the goods stored without expense to petitioner, and petitioner may

retake possession of all or part of the unsold goods at any time at its option.

(4) The dealer may store all or any portion of the goods consigned to him with other dealers, providing the latter signed consignment agreements identical to those signed by him.

(5) Title to consigned goods remains in petitioner until the goods are sold by the dealer in the ordinary course of business.

(6) Petitioner is responsible for the payment of taxes levied on the consigned goods.

All of the bags of fertilizer in question were packed in Canada, and no bag was opened or otherwise worked upon in the United States while owned by petitioner. Some bags of fertilizer were brought from Canada to Spokane, Washington, where they were stored by petitioner in its own warehouse and thereafter shipped to dealers, but the majority of the bags of fertilizer in question were shipped directly from Canada to the individual dealers. The bags, as to weight and content, are suitable for the ultimate user's needs so that in the normal course of a dealer's business the bags are sold by the dealer to customers without being opened.

There is, further, no disagreement between the parties regarding the timely preservation of the constitutional question here involved. The same is covered by Paragraphs 2, 3 and 12 of Stipulation of Facts (Appendix B, infra, pp. 23a, 24a, 28a). However, and in order that this Court may be fully advised, the events giving rise to the present litigation are these:

The proceeding began on or about December 31, 1962, when the Assessor for Marion County, Oregon, directed petitioner to file a tax return for a portion of the fertilizer in dispute at that time situated in Marion County, Oregon (Appendix B, infra, p. 49a). Upon petitioner's refusal to do so, the Sheriff and Tax Collector for Marion County, Oregon, on February 7, 1963, notified petitioner that its fertilizer would be added to the 1962-63 tax roll and granted petitioner until February 27, 1963, to show cause why such property should not be so added (Appendix B, infra, p. 48a). On February 11, 1963, petitioner protested the actions of the Sheriff, claiming the fertilizer was exempt from state ad valorem taxation under Article I, Sec. 10 of the United States Constitution (Appendix B, infra, p. 47a). On February 21, 1963, the Sheriff and Tax Collector for Marion County, Oregon, rejected petitioner's protest, and on March 4, 1963, levied a tax on petitioner's fertilizer in Marion County, Oregon (Appendix A, infra, p. 19a; Appendix B, infra, p. 45a). Thereafter, and on March 11, 1963, petitioner, pursuant to the provisions of Sec. 306-.515 of Oregon Revised Statutes, appealed to the Oregon State Tax Commission from the acts of the Sheriff and Tax Collector of Marion County, Oregon (Appendix B, infra, p. 43a). In the meantime and while the proceedings in Marion County, Oregon, were pending before the Oregon Tax Commission, additional proceedings were instituted against petitioner by the Sheriffs and Tax Collectors of Benton, Clackamas, Clatsop, Crook, Deschutes, Douglas, Jackson, Jefferson, Klamath, Lane, Linn, Malheur, Multnomah, Polk, Umatilla Union,

Washington and Yamhill Counties, Oregon (Appendix B, infra, pp. 23a, 29a-33a). Petitioner duly and timely protested such actions, and after rejections of its protest, appealed the levy of additional taxes to the Commission (Appendix B, pp. 24a, 29a-33a, 43a, 44a).

The Oregon State Tax Commission elected to first hear petitioner's appeal from the action of the Multnomah County Sheriff and Assessor, and on September 15, 1964, it rendered its opinion upholding the actions of the Assessor and Sheriff of Multnomah County, Oregon (Appendix A, infra, pp. 16a-18a, Appendix B, p. 23a).

After the decision of the Oregon State Tax Commission, petitioner, on October 23, 1964, filed in the Oregon Tax Court a Complaint for the cancellation of the personal property tax assessments and for a refund of taxes paid. In its complaint, plaintiff alleged that the property assessed was not taxable by the State of Oregon under Article I, Sec. 10 of the United States Constitution (Appendix B, infra, pp. 40a-42a). On October 30, 1964, the Oregon State Tax Commission filed its answer, and thereafter, on March 23, 1965, the matters above set forth were included in the above mentioned stipulation of facts. On May 27, 1965, the Oregon Tax Court entered its decision, holding petitioner's fertilizer was exempt from ad valorem taxation under Article I, Sec. 10 of the United States Constitution. On June 9, 1965, the Oregon Tax Court entered its decree, setting aside all of the assessments made by the Sheriffs and Assessors of the 17 Oregon counties involved and ordered a refund of all taxes paid.

Thereafter, on July 6, 1965, the Oregon State Tax Commission appealed to the Supreme Court of the State of Oregon from the decree of the Oregon Tax Court. On February 9, 1966, the Supreme Court of the State of Oregon reversed the Oregon Tax Court holding petitioner's fertilizer was subject to taxation. In reversing the Oregon Tax Court, the Supreme Court of the State of Oregon concluded that this Court's decision in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29, a case strikingly similar, if not identical, to the case at bar, was not controlling. That case, it was said, was not in point because an importer in the constitutional sense must be the person to whom the imported goods are sent, that is, and in the language of the Oregon Supreme Court:

> ". . . the person 'to whom the goods are sent and who himself presents the invoice, makes the entry, receives the bill of lading, and gets the goods' . . . the person who makes the entry, pays the duty, etc.; i.e., the primary consignee—the one to whom the carrier may lawfully make delivery in accordance with his contract of carriage—is the importer." (Appendix A, infra, pp. 5a, 6a, 8a).

To further differentiate *Low* v. *Austin*, 80 U.S. (13 Wall.) 29, from the present case, the Oregon Supreme Court construed the language ". . . in the hands of the importer," as used by this Court in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29, at 32, and in many other decisions of this Court, to mean and be limited to imported goods "in the possession of the importer" (Appendix A, infra, p. 7a).

As the imported goods in the case here under discus-

sion were for the most part sent directly from Canada to the Oregon dealers and since petitioner did not have physical possession of the same, although it was the importer, the Oregon Supreme Court arrived at the conclusion that this Court's decision in *Low* v. *Austin,* 80 U.S. (13 Wall.) 29, did not apply. Having so held, the Oregon Supreme Court went on to say that no Court had held that goods in the hands of a consignee of an importer retain their constitutional immunity from taxation; that Article I, Sec. 10 of the United States Constitution must be strictly construed; and concluded that there being no precedents opposing taxation of petitioner's goods, the same should be taxed (Appendix A, infra, pp. 4a, 9a, 10a).

Petitioner thereafter and within the time permitted by law filed a petition for rehearing, requesting a reconsideration of the foregoing opinion by the Supreme Court of the State of Oregon sitting en banc. Said petition was denied without opinion by the Supreme Court of the State of Oregon on March 22, 1966. — Or. —, — P.2. —, 82 O.A.S. 2 (Appendix B, infra, p. 21a).

## REASONS FOR GRANTING THE WRIT

To petitioner, the most immediate and the clearest reason for granting the writ lies in the fact that the decisions of the Supreme Court of the State of Oregon is in direct conflict with this Court's decision in *Low* v. *Austin,* 80 U.S. (13 Wall.) 29. and the position taken by the Oregon Supreme Court in its attempt to distinguish the latter case from the case at bar creates

such additional complex constitutional problems as to leave the present state of the law in this field in doubt.

To distinguish *Low* v. *Austin,* 80 U.S. (13 Wall.) 29, and relying upon *Knox* v. *Devens,* 14 Fed. Cas. 801 (No. 7905) (C.C.D., Mass. 1829); *Baldwin* v. *United States,* 113 F. 217, 218 (2d Cir. 1902); and *United States* v. *Mexican International R. Co.,* 151 F. 545 (5th Cir. 1907), the Oregon Supreme Court came to the conclusion that "the person to whom the goods are sent" or "the primary consignee" is to be considered the importer under Article I, Sec. 10 of the United States Constitution (Appendix A, infra, pp. 5a-8a).

*Knox* v. *Devens,* 14 Fed. Cas. 801 (No. 7905) (C.C.D. Mass. 1829); *Baldwin* v. *United States,* 113 F. 217, 218 (2d Cir. 1902); and *United States* v. *Mexican International R. Co.,* 151 F. 545 (5th Cir. 1907), are cases arising under the revenue laws and relate to the person or persons liable to the Federal Government for the payment of customs duties. For example, *Knox* v. *Devens,* 14 Fed. Cas. 801 (No. 7905) (C.C.D. Mass. 1829), was decided under the Revenue Collection Act of 1799 (1 Stat. 655), which provides:

> "No person but the owner or consignee, or, in his absence or sickness, his agent or factor in his name, is entitled to enter the goods at the custom house or give bond for the duties or pay the duties."

By the process of amendment, the foregoing statute has found its way into our present code of laws as 19 U.S.C. § 1483, and reads:

"All merchandise imported into the United

States shall be held to be the property of the person to whom the same are consigned."

If the rules of *Knox, Baldwin* and *Mexican International R. Co.* apply, as the Oregon Supreme Court says they do, a direct conflict necessarily exists with this Court's decision in *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, for in *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, it is said that the immunity from state taxation is to be determined by the status of the goods rather than the relationship of the parties to the goods or technicalities of title, and that an importer for the purposes of Article I, Sec. 10 of the United States Constitution is the person who is the inducing or efficient cause of bringing the imported goods into the United States.

If the rule of *Knox, Baldwin* and *Mexican International R. Co.* governs, it would seem to petitioner that the Oregon Supreme Court is suggesting that Congress has a right by legislative act to change the Constitution, for under the Revenue Law of 1799 the owner or consignee would be the importer under the Oregon Supreme Court's interpretation, while under the present Revenue Act only the consignee could qualify.

Finally, applying the logic used by the Oregon Supreme Court to the facts of the case at bar, the individual Oregon dealers would necessarily have to be importers in the constitutional sense, for they are—and we use the words of the Oregon Supreme Court—"the one(s) to whom the carrier may lawfully make delivery in accordance with his contract of carriage." Since they are in possession of the fertilizer, the fertilizer being unsold,

in its original packages, with its status unchanged, the prohibition of Article I, Sec. 10 of the United States Constitution must apply, as this is exactly the Oregon Supreme Court's interpretation of *Low* v. *Austin,* 80 U.S. (13 Wall.) 29.

In addition, the Oregon Supreme Court in the case at bar says that "in the hands of the importer," as used by this Court in interpreting Article I, Sec. 10 of the United States Constitution, means "in the possession of the importer." (Appendix A, infra, p. 7a). If this is so, an additional conflict exists between the Oregon Supreme Court's decision in the case at bar and the decisions of this Court in a number of cases, among which, in addition to *Low* v. *Austin,* 80 U.S. (13 Wall.) 29, are *Department of Revenue* v. *James B. Beam Distilling Co.,* 377 U.S. 341, *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama,* 288 U.S. 218, and *Cook* v. *Pennsylvania,* 97 U.S. (7 Otto.) 566, for in the cases last mentioned, the imported goods were respectively in the hands of bailees for hire and an auctioneer for sale rather than in the actual physical possession of the importer.

This Court, in construing and interpreting Article I, Sec. 10 of the United States Constitution over the last 133 years, has never gone so far. The key decision in this field by this Court is *Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 419. It is there said that imported goods retain their status exempt from state taxation "while remaining the property of the importer." "In the hands of the importer" first appears in Mr. Chief Justice Tan-

ey's opinion in the *License Tax Cases*, 46 U.S. (5 Howard) 504, 575, where Mr. Chief Justice Taney, in interpreting *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, states:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of the mass of the property in the state usually taxed for the support of the state government."

In *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, the language employed is "until they have passed from the control of the importer." In *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U.S. 218, the reference is "while it remained the property of appellant (the importer)." "Property" and "control" are not synonymous with "possession".

The Oregon Supreme Court says that no precedent opposes taxation of petitioner's merchandise, and concludes that the same should be taxed (Appendix A, infra, p. 4a, 10a). The converse of this proposition is equally true; since there is no precedent for taxing petitioner's goods, the Constitution renders them immune.

The principles governing problems in this field are well settled. By bringing imported merchandise into the United States and paying the duty thereupon to the United States, an importer acquires the right to sell merchandise imported for sale in its original package. *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419. *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, also recognizes

the fact that in every case imported goods must be stored unless sold directly from the dock. Subsequent decisions of this Court recognize the right to store goods in public warehouses. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218. Other decisions of this Court recognize the right to store imported goods with an auctioneer or factor. *Cook* v. *Pennsylvania*, 97 U.S. (7 Otto.) 566; *Low* v. *Austin*, 80 U.S. (13 Wall.) 29. In addition, this Court has recognized over the years that the importer's right of sale need not be exercised by the importer personally. The importer may employ an itinerant peddler, a commission merchant, an auctioneer, or a traveling salesman to perfect his right of sale. *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419; *Cook* v. *Pennsylvania*, 97 U.S. (7 Otto.) 566; *Low* v. *Austin*, 80 U.S. (13 Wall.) 29; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218. The imported merchandise may be sold at wholesale or retail. *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419; *Low* v. *Austin*, 80 U.S. (13 Wall.) 29.

Although these principles should apply to the case at bar, they were not applied. The Oregon Supreme Court looked solely to factual precedents, and, having in its opinion found no factual precedents opposing its views, directed the taxation of petitioner's merchandise.

The mode employed by petitioner in bringing imported products into the United States is neither new nor novel, as the cases decided by this Court, the lower federal courts and state courts demonstrate. For example,

see *Waring* v. *The Mayor of Mobile,* 75 U.S. (8 Wall.) 110; *Low* v. *Austin,* 80 U.S. (13 Wall.) 29, and *Southern Pacific Company* v. *City of Calexico,* 288 F. 634 (D.C. S.D. Cal. 1923).

Consignments of goods for sale are not uncommon. See, for instance, *In re Taxes,* 46 Haw. 292, 380 P.2d 156. One such consignment of fertilizer was recently upheld in *Armour & Co.* v. *Celic,* 294 F.2d 432 (2d Cir. 1962), on second appeal, 331 F.2d 256 (2d Cir. 1964). The consignment of fertilizer is a legitimate business device employed by an importer such as petitioner with a limited sales and service staff and limited warehousing facilities to make his product available for sale in the United States. As the record in this case reflects, in the State of Oregon alone, petitioner has defended or instituted some 20 separate legal proceedings to bring the present proceeding thus far. This petition is the 21st. If all cases of this variety are to be decided as the Oregon Supreme Court has decided this one on the presence or absence of exact factual precedents rather than upon established constitutional principles, there will be no end to this type of litigation and in turn, irreparable injury caused to the entire import-export field of commerce.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted. The case presents issues which are not only important to petitioner and others engaged in the importation of

products into the United States, but are also of significance to the respective states in the administration of their revenue laws.

Respectfully submitted,

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June 1966.

## APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON
Department 1

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COMINCO PRODUCTS, INC.,
*Respondent,*

v.

STATE TAX COMMISSION,
*Appellant.*

ENDORSED:
Filed February 9, 1966
F. M. Sercombe,
Clerk

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*Appeal from Oregon Tax Court*
EDWARD H. HOWELL, Judge

Before MCALLISTER, Chief Justice,
and PERRY, SLOAN, DENECKE and SCHWAB, Justices

*Reversed*

SCHWAB, J. (Pro Tempore)

The defendant, Oregon State Tax Commission, appeals from a tax court decree, 2 OTR Adv Sh 165, holding that the U. S. Constitution, Art. I, § 10, prohibits the levying of an ad valorem tax on certain fertilizers owned and imported by plaintiff, Cominco Products, Inc. The pertinent portion of Art. I, § 10, U. S. Constitution, reads:

> "* * * No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * *."

The parties agree that property in the possession of an *importer* in the original form or package in which it was imported is exempt from tax. The issue is whether

unsold goods, imported for sale and delivered by the importer to a consignee who is a dealer in such merchandise, retain the immunity from taxation.

The case was tried below on stipulated facts, Cominco is a Washington corporation and is the *importer*. It purchases fertilizers in Canada from its parent Canada corporation, Consolidated Mining and Smelting Company of Canada, Limited, and imports the fertilizer in bags into the United States for sale. It stores some of its imports in public warehouses in Oregon and it is conceded that this merchandise is immune from taxation. The issue arises as to the merchandise shipped by Cominco to fertilizer dealers in seventeen Oregon counties and held by the dealers for sale under consignment agreements. All bags of fertilizer are sealed in Canada, and no bag is opened or otherwise worked upon in the United States while owned by Cominco. Since the stipulation is silent as to whether the bags are baled with rope or wire, or packaged in the process of shipment, we must assume they are not. Some bags are brought from Canada to Spokane where they are stored by Cominco and thereafter shipped to dealers, but the majority of the bags are shipped directly from Canada to the individual dealers. The bags, as to weight and content, are suitable for the customers' needs so that the normal course of the dealers' business bags are sold without being opened.

The pertinent aspects of the consignment contract entered into by Cominco and each of its Oregon dealers are:

(1) The dealer is to diligently seek to sell the merchandise.

(2) The dealer is to keep complete records covering consigned goods and to report each month's sales to Cominco on or before the 5th day of the following month. Cominco is thereupon to bill the dealer for the previous month's sales.

(3) The dealer agrees to keep the goods stored without expense to Cominco, and Cominco may re-take possession of all or part of the unsold goods at any time at its option.

(4) The dealer may store all or any portion of goods consigned to him with other dealers, providing the latter sign consignment agreements identical to those signed by him.

(5) Title to consigned goods remains in Cominco until the goods are sold by the dealer in the ordinary course of business.

"* * * The design of the constitutional immunity was to prevent 'the great importing States [from laying] a tax on the non-importing States,' to which the imported property is or might ultimately be destined, which would not only discriminate against them but also 'would necessarily produce countervailing measures on the part of those States whose situation was less favourable to importation.' *Brown* v. *State of Maryland, supra,* at page 440. See Madison, Debates in the Federal Convention of 1787, August 28, 1787. * * * The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. . . . Youngstown Sheet & Tube Co. v. Bowers, 358 US 534, 345, 79 S Ct 383, 389-90, 3 L Ed2d 490.

The key decision in this field is Brown v. State of Maryland, 25 US (12 Wheat.) 419, 6 L Ed 678 (1827) in which the state of Maryland attempted to require all importers of foreign goods to pay a license fee for the privilege of dealing in such goods. The court, speaking through Chief Justice Marshall, held that Maryland could not exact such a fee, stating:

> "* * * It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

The plaintiff, Cominco, concedes that unless Low v. Austin, 80 US (13 Wall.) 29, 20 L Ed 517 (1871), or Waring v. Mayor of Mobile, 75 US (8 Wall.) 110, 19 L Ed 342 (1869), is construed to so hold, no court has held that goods in the hands of the consignee of an importer retain the constitutional immunity from taxation.

In Low v. Austin, supra, Low and associates were importing, shipping and commission merchants in San Francisco. They had in their possession wine which was the property of Gustave Gibert of France. The wine was held for sale by Law in its original shipping cases pursuant to a consignment agreement between Gibert and Low, title remaining in Gibert. The defendant Austin,

assessor of San Francisco county, sought to collect a tax on the wine. The California supreme court, in Low v. Austin, No. 2369, 1 Cal. Unrep. 638 (1870), held that the wine was subject to tax.

The U. S. Supreme Court reversed, citing the test laid down in Brown v. Maryland, supra, and stating that goods do not lose their character as imports "until they have passed from the control of the importer or been broken up by him from the original cases." 30 US at 34.

Plaintiff argues that the opinions show that Gibert, the Frenchman, and not Low was the *importer,* and that the necessary implication is — "in the hands of the importer also means in the hands of the consignee of the importer." It bases this argument upon a sentence appearing in the second paragraph of the California supreme court decision: "The goods had, just prior to their possession by plaintiffs, been imported by Gibert." (Emphasis supplied). 1 Cal. Unrep. at 638.

A review of the cases defining "importer," and of the Low opinions shows that Low and associates, the California merchants, were the importers, not Gibert. In Knox v. Devens, 14 Fed Cas 801 (No. 7905) (C.C. D. Mass 1829), the court, in applying the revenue collection act of 1799, said:

> "* * * [W]hen a person is a bona fide consignee, the liability to pay duties attaches to him as importer * * *." (Emphasis supplied). 14 Fed Cas at 307.

In Baldwin v. United States, 113 Fed 217, 218 (2nd Cir 1902), the Court of Appeals held that the person "to whom the goods are sent, and who himself presents the invoice, makes the entry, receives the bill of lading, and gets the goods" is the *importer*. To the same effect see United States v. Mexican International R. Co., 151 Fed 545 (5th Cir 1907). In the *Low* case the thrust of the California court's opinion, following its apparently inadvertent use of the phrase "imported by Gibert," was that even though the merchants, Low and associates, were the importers, the goods should not be exempt from taxation.

> "* * * We see no reason why imported goods, exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the state as much as do domestic goods similarly situated. Nor do we see the slightest difference whether *the importer is also the merchant* who sells * * *." (Emphasis supplied). 1 Cal. Unrep. at 643.

The synopses of the briefs of the parties before the U. S. Supreme Court appearing on pages 517 and 518 of 20 L Ed demonstrate that both parties assumed without question that the merchants, Low and associates, were the importers. Justice Field, in his opinion, states:

> "* * * [T]he plaintiffs * * * are, importing, shipping and commission merchants, in the city of San Francisco * * *. In 1868, they received, on consignment from parties in France, certain champagne wines of the value of $10,000, upon which *they paid the duties and charges* at the custom-house." (Emphasis supplied).

He then goes on:

> "The simple question * * * is, whether imported

merchandise, upon which the duties and charges at the custom-house have been paid, is subject to state taxation, whilst remaining in the original cases, unbroken and unsold, *in the hands of the importer.* Low v. Austin, 80 US (13 Wall.) at 32, 20 L Ed at 518.

The words "in the hands of the importer" in their ordinary and usual sense mean "in the possession of the importer." To interpret them so broadly as to mean goods "in the possession of a consignee of the importer" would be to disregard the language of Brown v. Maryland, supra, establishing the principle of strict construction of the import-export clause:

> "* * * It may be conceded, that *the words of the prohibition ought not to be pressed to their utmost extent;* that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. * * * [*W*]*e admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure* * * *." 25 US 419, 439-40 (Emphasis supplied).

Waring v. Mayor of Mobile, 75 US (8 Wall.) 110, 19 L Ed 342, was a case in which the plaintiff was neither the shipper nor the consignee to whom salt was originally shipped. In seeking the constitutional exemption he conceded that he was not the *importer.* While the salt was in a ship enroute, he purchased it from the consignee. The court, in holding that the salt was sub-

ject to tax, said:

> "* * * [T]he court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers * * *." 75 US (8 Wall.) at 120, 19 L Ed at 345.

A shipper who ships goods may also be the consignee, i.e., the person to whom they are shipped. The relevant point is that the person who makes the entry, pays the duty, etc., i.e., the primary consignee—the one to whom the carrier may lawfully make delivery in accordance with its contract of carriage—is the *importer*. It is in this sense that the court used the word consignees in the *Waring* case.

Cominco cites several other cases[1] applying the import-export clause. All involve situations in which the goods remained in their original packages either in the warehouses of the importers or in public warehouses subject to the express directions of the importers.

We note only two cases discussing the effect of a consignment by the importer. State ex rel H. A. Morton Co. v. Board of Review, 15 Wis 2d 330, 112 NW2d 914, and Parrott & Co. v. City and County of San Francisco, 131 Cal App 2d 332, 280 P2d 881. Both cite the *Low* case with approval and contain dicta to the effect that a consignment by the importer terminates the exemption

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[1] Dept. of Revenue v. James Beam Co., 377 US 341, 34 S Ct 1247, 12 L Ed 2d 362; Anglo-Chilean Corp. v. Alabama, 288 US 218, 53 S Ct 373, 77 L Ed 710; Southern Pac. Co. v. City of Calexico, 288 Fed 634 (D.C. S.D. Calif. 1923) and Tricon Inc. v. King County, 60 Wash 2d 392, 374 P2d 174, cert. den., 372 US 908.

from taxation. Neither case actually involved a consignment by the importer.

Two recent U. S. Supreme Court decisions, while not precisely in point, demonstrate the court's continuing intent that the import-export clause be strictly construed. In Youngstown Sheet & Tube Co. v. Bowers, supra, the plaintiff imported iron ore for use in its manufacturing processes. The imported ore was kept in a separate pile on the plaintiff's premises until used. The court, citing with approval May & Co. v. City of New Orleans, 173 US 496, 509, 20 S Ct 976, 980, 44 L Ed 1165, said:

> "The materials here in question were imported to supply * * * the manufacturer's current operating needs. * * * [T]hey [the ore piles] stood in the same relation to the State as like piles of domestic materials * * *. In these circumstances the tax was not on 'imports,' nor was it a tax on the materials because they had been imported * * *. They were therefore subject to taxation just like domestic property that was kept in the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the view pressed upon us by the manufacturers." 358 US 534 at 549-50, 79 S Ct 383 at 392, 3 L Ed 2d 490.

May & Co. v. City of New Orleans, supra, involved the unbroken package test. May & Co. handled imported goods. Towels came in packages of two, three and five

dozen. These packages were never broken but in some instances the packages were removed from the large boxes in which they were shipped. The Supreme Court affirmed the right of Louisiana to tax these goods, stating:

> "The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing things imported into the State. It was not a tax on the plaintiffs' goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in the country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the view pressed upon us by the plaintiffs." 178 US at 509.

To extend the constitutional prohibition to include goods consigned by the importer to dealers scattered throughout the state of Oregon solely for the purpose of offering said goods for sale in domestic commerce would do violence to the guidelines established by the U. S. Supreme Court for the interpretation of Art. I, § 10, U. S. Constitution.

Reversed.

IN THE OREGON TAX COURT
Property Tax

COMINCO PRODUCTS, INC., )
Plaintiff, )
v. ) No. 154
STATE TAX COMMISSION, )
Defendant. )

DECISION

The issue in this case is whether certain fertilizer imported by plaintiff for sale is exempt from ad valorem personal property taxation because of the import-export clause of the United States Constitution. The facts have been stipulated.

Plaintiff is a subsidiary of Consolidated Mining and Smelting Company of Canada. The fertilizer, manufactured by the latter company, is sold to plaintiff in Canada. Some of the bags of fertilizer are shipped from Canada to Spokane and from there to dealers, but the majority of the bags are shipped directly from Canada to the dealers in Oregon. Balfour, Guthrie and Company is the exclusive agent for the plaintiff and consigns the fertilizer to various dealers around the state. The consignment contract provides, among other things, that plaintiff is the sole owner of the fertilizer.

The stipulation of facts provides that "in the normal course of the dealer's business" the bags are sold by the dealer to the customer without being opened.

Article I, § 10, of the United States Constitution provides: ". . . No State shall, without the Consent of

the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . ."

Since 1827, the rule has been that imported goods are not subject to state taxation, either ad valorem or license, until the articles are either sold, removed from the original package, or put to the use for which they were imported. *Brown* v. *Maryland,* 25 US 419 (12 Wheaton 419), 6 L Ed 678 (1827); *Low* v. *Austin,* 13 Wall 29, 20 L Ed 517 (1871).

The Supreme Court of the United States has recognized a distinction between goods imported for sale and goods imported for manufacturing. *Youngstown Sheet & Tube Co.* v. *Bowers* and *United States Plywood Corp.* v. *City of Algoma,* (decided together) 358 US 534, 79 S Ct 383, 3 L Ed2d 490 (1959); *State* v. *Board of Review, City of Milwaukie,* 15 Wis2d 330, 112 NW2d 914 (1961).

If the imported goods are to be used for manufacturing and have entered the manufacturing process and are part of the manufacturers "current operational needs" they are subject to state taxation even though they remain in their original package. *Youngstown Sheet & Tube Co.* v. *Bowers* and *United States Plywood* v. *City of Algoma, supra; Continental Coffee Co.* vs. *Bowers,* 174 Ohio St 435, 189 NE2d 901 (1963); *City and County of Dever* v. *Denver Publishing Co.,* — Colo. —, 387 P2d 48 (1963).

It would appear that the immunity attached to goods in their "original package" (*Brown* v. *Maryland, supra*)

has now been abrogated in manufacturing cases upon the theory that the goods after importation had been put to the use for which they were imported; i.e., the manufacturing process.

However, in cases where the goods were imported for resale, as compared to use in manufacturing, the immunity of the "original package" doctrine is retained. In *Tricon, Inc.* v. *King County,* 60 Wash2d 392, 374 P2d 174 (1962) the plaintiffs were importers of steel and glass products which were held for resale. The goods remained in the original packages in which they arrived until sold to purchasers. The court stated: "We do not think the Supreme Court has indicated by implication that goods imported for resale, and which remain in their original containers, lose their character as imports immune from state taxation when they become a part of the importer's current inventory of goods held for sale . . ."

In *State* v. *Board of Review, City of Milwaukie, supra,* the court held that imported liquor held for sale and still in its original unopened cases could not be taxed but if the cases had been opened the liquor was taxable.

Imported wines still in their original cases in the importer's warehouse for sale to customers were held not taxable in *Low* v. *Austin, supra.*

There appears to be no valid reason for distinguishing between goods imported for manufacturing and goods imported for sale and this court agrees with

the following statement of the Washington Supreme Court in *Tricon, Inc.* v. *King County, supra*:

> ". . . Whatever may be our thoughts as to any fundamental inconsistency in distinguishing between goods imported for one's own use which become a part of current inventory in the manufacturing process and goods imported for resale which become a part of the importer's current inventory in the selling process, we are bound, as heretofore stated, to accept the rationale of the decisions of the Supreme Court of the United States."

In the instant case, acocrding to the stipulated facts, the fertilizer is still in its original bags; is owned by the plaintiff and is held for sale. These facts bring the case squarely within the rule announced in the *Tricon* case with the exception that the fertilizer has been consigned to dealers and the goods in the *Tricon* case had not been so consigned.

Research has not disclosed any cases where the courts have been presented with facts involving a consignment by the importer. Does such consignment by the importer cause the goods, otherwise exempt, to become taxable?

In *State* v. *Board of Review, City of Milwaukie, supra,* and *Parrot & Co.* v. *City and County of San Francisco,* 131 Cal App2d 332, 280 P2d 881 (1955) both courts mentioned that the goods were exempt from taxation if they were "unsold or unconsigned" and still in their original package. However, no consignments were involved in either case and the references to consignments must be disregarded.

As previously mentioned, the facts have been stipulated and no testimony was presented. In addition, a copy of the consignment contract between plaintiff and the dealers is attached as an exhibit to the stipulation. It provides that title to the fertilizer remains in the plaintiff; the consignee is to maintain separate records and inventories of the consigned goods; the consignee is to submit monthly statements reporting the location and quantity of the inventory; the plaintiff has the right to inspect the goods and to retake possession of all or part of them.

Under the authority of the *Tricon* case, *Low* v. *Austin* and *State* v. *Board of Review, City of Milwaukie*, the plaintiff could have offered the goods for sale and they would have been exempt from taxation as long as they remained in their original packages. The dealers, if they had been the importers, could have offered the goods for sale in their original packages and they would have been exempt. From the stipulated facts and the consignment contract, this court does not conclude that the consignment by the plaintiff causes the goods to lose their exempt status as an import.

No costs to either party.

Dated this 27 day of May, 1965.

/s/ EDWARD H. HOWELL
Judge

STATE OF OREGON

STATE TAX COMMISSION

| | | |
|---|---|---|
| In the Matter of the Appeal of Cominco Products, Inc., from the Action of the Multnomah County Sheriff and Assessor Concerning Certain Omitted Personal Property Assessments for the 1957-58 Tax Year. | ) | OPINION AND ORDER NO. VL 64-158 |

Cominco Products, Inc., hereinafter referred to as "Petitioner", has appealed to the State Tax Commission from the action of the Multnomah County Sheriff and Assessor in adding to the 1957-58 tax and assessment rolls certain alleged omitted personal property described as bagged and bulk fertilizer.

A hearing was held before Mr. J. M. Burke, Hearing Officer of the State Tax Commission, on July 22, 1963, in Room 441 of the State Office Building in Portland, Oregon. Present at the hearing representing the Petitioner was Mr. Alfred H. Stoloff, Attorney at Law. The County was represented by Mr. Alfred B. Thomas, Assistant Attorney General. Subsequent to the hearing, representatives of the Petitioner and the County entered into an agreed statement of facts for the purpose of disposing of the appeal without further hearings.

A Summary of Evidence, Findings of Fact and Conclusions of Law, together with a Recommendation, were prepared by the hearing officer and reviewed by the entire Commission.

This appeal raises for the Commission's determination two questions with respect to assessment and taxation by local authorities of imported goods. The first question is whether bagged fertilizer imported by Petitioner into the United States from Canada and transferred to dealers in Multnomah County (title remains with Petitioner until payment) is immune from local taxation under the Import-Export Clause of the United States Constitution. The second question is whether the imported bagged fertilizer is exempt when no sale or transfer is made and the fertilizer is stored in public warehouses by Petitioner.

Taking up the latter question first, it is the Commission's opinion that the imported bag fertilizer in public warehouses is exempt while still owned by Petitioner and no sale, transfer or consignment has been made. The assessment of such goods in Multnomah County must therefore be stricken from the assessment and tax rolls for the tax year in question.

With respect to the first question concerning imported fertilizer transferred by Petitioner to dealers, Petitioner cites the case of *Low* v. *Austin*, 80 U.S. 29, in support of its claim that the bagged fertilizer is exempt from assessment and taxation by Multnomah County. In the *Low* case, the Court held that unsold imported goods in the hands of the importer are immune from state taxation. In the opinion of the Commission, the facts in the *Low* case differ substantially from the facts presented in the instant appeal, for here, the goods are no longer in the hands of the importer but are in the hands of the dealer. In the *Low* case, the importer was

the consignee; in this case the dealer is, at best, a consignee from the importer. (See *Low* case, p. 32, and Justice Frankfurter's dissent in *Youngstown Co.* v. *Bowers,* 358 U.S. 534, 560).

In addition, aside from the fact that the dealer has possession of the goods, the dealer arrangement appears in substance to constitute a sale. From the evidence before the Commission, it appears that in the normal course of business the dealer is expected to pay for the goods whether or not they have been sold.

In the opinion of the Commission, the transfer from the importer terminates the exempt status. The Commission concludes that the assessments made under these circumstances should be upheld and that Petitioner's appeal insofar as it relates to the imported goods transferred to dealers by Petitioner, should be dismissed.

NOW, THEREFORE, WE HEREBY ORDER Mr. Donald Clark, Sheriff and Tax Collector of Multnomah County, to make adjustments to the 1957-58 tax roll in conformity with this Order, and that Joe Hawkins, Assessor of Multnomah County, concur herein.

Done at Salem, Oregon, this 15th day of September, 1964.

STATE TAX COMMISSION

/s/ F. H. W. HOEFKE
Commissioner and Chairman

/s/ P. F. LINIGER
Commissioner

/s/ C. H. MACK
Commissioner and Secretary

DENVER YOUNG
SHERIFF AND TAX COLLECTOR
FOR MARION COUNTY
Salem, Oregon

February 21, 1963

Alfred H. Stoloff
Phillips, Coughlin, Buell & Phillips
Electric Building
621 Alder Street
Portland, Oregon

Dear Sir:

This is to acknowledge receipt of your letter of February 11, concerning inventory of Cominco Products, Inc. in which you cited an opinion that held that this inventory of fertilizer was exempt from Personal Property Tax. We have conferred with both the County Assessor and the State Tax Commission and both agree that you have failed to show cause why this inventory should not be added to your tax roll for the year 1962.

In two opinions written by Alfred B. Thomas, Attorney with the State Tax Commission, Mr. Thomas has shown in his opinions that this imported fertilizer is subject to taxation and should be placed upon the tax rolls. One letter written in this regard was written on March 26, 1962 to Mr. Fred Muhs, Yamhill County Assessor, Yamhill County Court House, McMinnville, Oregon (Re: L.S. V. 3015). The second letter referred to written by Mr. Thomas October 18, 1962 and addressed to Cominco Products, Inc., 933 West 3rd Avenue, Spokane, 4, Washington and carried Re: L.S. V. 4044.

As it is the opinion of both the State Tax Commission

and County Assessor that this property is taxable and should be added to the 1962 Personal Property Tax Roll, we must advise that it is our intent to add this to the tax roll in accordance with our letter of February 7, 1963.

Yours truly,

DENVER YOUNG
Sheriff and Tax Collector

by H. T. EVANS
Chief Tax Deputy

## APPENDIX B

### EXCERPTS FROM RECORD AND MATTERS COVERED THEREIN BY STIPULATION

EXCERPTS FROM PROCEEDINGS HELD ON THE 22ND DAY OF MARCH, 1966. BEING THE 8TH JUDICIAL DAY OF THE MARCH TERM OF THE SUPREME COURT OF THE STATE OF OREGON

| | | |
|---|---|---|
| COMINCO PRODUCTS, INC. Respondent, | ) | Appeal from |
| v. | ) | Oregon Tax |
| STATE TAX COMMISSION, Appellant. | ) | Court |

The court having duly considered respondent's petition for rehearing, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same hereby is denied.

OREGON TAX COURT
Property Tax
No. 154

| | | |
|---|---|---|
| COMINCO PRODUCTS, INC. Plaintiff, | ) | STIPULATION |
| v. | ) | OF |
| STATE TAX COMMISSION, Defendant. | ) | FACTS |

The parties stipulate through their respective attorneys that the following facts and statements contained in documents marked as exhibits hereto may be accepted as facts for the purpose of this case, and all such exhibits are incorporated in this Stipulation and made a part hereof. This Stipulation is also intended to present an agreed case under ORS Chapter 27 with respect to all assessments described in Exhibit 1, appeals from which are now pending before the State Tax Commission.

1. At all times mentioned, COMINCO PRODUCTS, INC. (CPI) was and is a corporation existing under the laws of Washington and was and is duly authorized and qualified to transact business as a foreign corporation in Oregon.

2. Personal property tax assessments for the years indicated were made on inventories of fertilizers set forth in Exhibit 1 attached hereto. Tax Commission Appeal No. 26-3-61 for the year 1957-1958 which appears on page 4 of Exhibit 1 pertains to property in Multnomah County which is the subject of Opinion and Order of the Commission VL 64-158 attached hereto as Exhibit 2. All other property described in Exhibit 1 is the subject of the agreed case.

3. Protests and appeals from such assessments were duly and timely filed by CPI with the county taxing officials concerned, and with the State Tax Commission. The Commission issued Opinion and Order No. VL 64-158 on September 15, 1964 and served it on CPI on September 16, 1964. All other appeals on Exhibit 1 are pending before the Commission.

4. All such fertilizers were manufactured in Canada by Consolidated Mining and Smelting Company of Canada Limited, the parent of CPI, and were purchased by CPI from its parent in Canada.

5. All such fertilizers were imported by CPI into the United States from Canada for sale.

6. CPI was the sole owner of such fertilizers and at no time were they hypothecated, pledged or encumbered.

7. All assessments set forth in Exhibit 1 relate to bagged fertilizers delivered to the dealers named in such exhibit and held by them for sale on the applicable tax dates pursuant to the terms and conditions contained in a contract entered into between CPI (through its exclusive sales agent, Balfour, Guthrie & Co. Ltd) and each of such dealers, a sample copy of which is attached hereto as Exhibit 3.

8. All bags were filled with such fertilizers in Canada and no bag was opened or otherwise worked upon in the United States while owned by CPI. Some bags were brought from Canada to Spokane where they were stored and thereafter shipped to dealers. The majority

of bags were shipped directly from Canada to dealers. Bags were shipped by CPI throughout the year prior to and after January 1, and sales were made by dealers prior to and after January 1. Bags were prepared as to weight and content suitable for the customers' needs so that in the normal course of the dealer's business the bags were sold by the dealer to its customers without being opened.

9. In each of the assessment years, a letter substantially similar to Exhibit 4, attached hereto, was mailed to dealers of bagged fertilizers.

10. At the ends of the respective fertilizer years, i.e., the 25th of June, 1957, 1958, 1959, 1960, 1961, 1962 and 1963, some dealers complied with the request contained in Exhibit 4, but not all did so and neither CPI nor Balfour, Guthrie made any effort to enforce such request. In Multnomah County, by June 25, 1957, Webfoot Fertilizer Co. had either sold or purchased for its own account all fertilizer therefore shipped to it pursuant to its consignment contract.

11. On or about December 7, 1964 CPI paid taxes and interest on such assessments under protest and without waiver of right of refund as follows:

| County | Years | Amount | Interest | Total |
|---|---|---|---|---|
| Marion | 1962-63 | $2,148.48 | $ 150.40 | $2,298.88 |
| Linn | 1957-58 | 551.04 | 295.02 | |
| | 1958-59 | 2,682.88 | 1,225.00 | |
| | 1959-60 | 19.55 | 7.36 | |
| | 1961-62 | 11.26 | 2.44 | |
| | 1964-65 | 24.01 | .04 | |
| | | 3,288.74 | 1,529.86 | 4,818.60 |
| Clackamas | 1960-61 | 138.74 | | |
| | 1963-64 | 30.32 | | |
| | 1964-65 | 5.03 | | 174.09 |
| Clatsop | 1958-59 | 3.76 | | 3.76 |
| Crook | 1962-63 | 127.11 | 4.66 | 131.77 |
| Deschutes | 1960-61 | 126.23 | | |
| | 1962-63 | 312.50 | | 438.73 |
| Jackson | 1957-58 | 199.04 | | |
| | 1958-59 | 34.07 | | |
| | 1960-61 | 11.98 | | |
| | 1961-62 | 168.36 | | |
| | 1962-63 | 180.90 | | |
| | 1964-65 | 59.82 | | 654.57 |
| Klamath | 1958-59 | 126.90 | | |
| | 1959-60 | 14.97 | | |
| | 1960-61 | 29.37 | | |
| | 1961-62 | 40.40 | | |
| | 1962-63 | 93.62 | | 305.26 |
| Lane | 1960-61 | 275.80 | | |
| | 1962-63 | 154.02 | | |
| | 1964-65 | 65.52 | | 495.34 |
| Multnomah | 1957-58 | 469.53 | 46.95 | 516.48 |

| County | Years | Amount | Interest | Total |
|---|---|---|---|---|
| Umatilla | 1962-63 | 76.63 | 10.98 | 87.61 |
| Polk | 1960-61 | 487.77 | | |
| | 1962-63 | 120.60 | | |
| | | 608.37 | 128.72 | 737.09 |
| Yamhill | 1960-61 | 485.82 | | |
| | 1962-63 | 95.11 | | 580.93 |
| Washington | 1957-58 | 131.47 | | |
| | 1958-59 | 61.56 | | |
| | 1960-61 | 79.13 | | |
| | 1962-63 | 86.94 | | 359.10 |
| Union | 1957-58 | 17.10 | | |
| | 1960-61 | 34.85 | | |
| | 1961-62 | 8.29 | | |
| | 1962-63 | 62.93 | | 123.17 |
| Douglas | 1957-58 | 418.52 | | |
| | 1958-59 | 68.53 | | |
| | | 487.05 | 19.48 | 506.53 |
| Benton | 1960-61 | 112.43 | | |
| | 1962-63 | 91.05 | | 203.48 |

12. Based on the foregoing facts, the issue to be decided is as follows: Whether the property herein has a status as an import. If yes, the assessments shall be stricken and refund shall be made of taxes and interest paid by CPI. The parties are agreed that any assessments on appeal before the Commission, and any taxes and interest paid thereon shall be disposed of in accordance with the decision of the Court. If no, taxes based on such assessments are due and payable by CPI. The parties do not waive their right of appeal.

13. All exhibits incorporated in this Stipulation may be admitted in evidence.

DATED this 23rd day of March, 1965.

COMINCO PRODUCTS, INC.

By: .....

ALFRED H. STOLOFF, of its attorneys

STATE TAX COMMISSION

By: .....

ALFRED B. THOMAS, Assistant Attorney General of the State of Oregon

Verifications Omitted

# OMITTED PROPERTY ASSESSMENTS
# COMINCO PRODUCTS, INC.

## EXHIBIT 1

| STC Appeal No. | Tax Years | Dealer and Location | Assessed Value |
|---|---|---|---|
| | | **BENTON** | |
| 2-3-31 | 1960-61 | Denson Feed & Seed, Corvallis | $ 1,340 |
| | 1962-63 | Corvallis Feed & Seed, Corvallis | 1,030 |
| | | | $ 2,370 |
| | | **CLACKAMAS** | |
| 3-3-391 | 1960-61 | Buchanan Cellers Grain Co., Canby | $ 1,580 |
| | | **CLATSOP** | |
| 4-3-17 | 1958-59 | Astoria Feed & Seed, Astoria, Ore. | $ 30 |
| | | **CROOK** | |
| 7-3-20 | 1962-63 | Ochoco Feed & Seed, Prineville | $ 1,815 |
| | | **DESCHUTES** | |
| 9-3-24 | 1958-59 | Mid-State Fertilizer Co., Redmond | $ 253 |
| | 1960-61 | Central Farmers Fert. Co., Redmond | 441 |
| | 1960-61 | Eastern Oregon Mills, Inc., Bend | 670 |
| | 1962-63 | Mid-State Fertilizer Co., Redmond | 1,185 |
| | | | $ 2,549 |
| | | **DOUGLAS** | |
| 10-3-15 | 1957-58 | Yoncalla Feed & Supply, Yoncalla | $ 320 |
| | 1957-58 | Wilbur-Ellis, Oakland, Oregon | 2,460 |
| | 1957-58 | Wilbur-Ellis, Roseburg, Oregon | 2,010 |
| | 1958-59 | Yoncalla Feed Co., Yoncalla, Ore. | 290 |
| | 1958-59 | C & S Feed Co., Oakland, Oregon | 240 |
| | 1958-59 | Rimell Feed & Seed, Canyonville | 110 |
| | | | $ 5,430 |

## JACKSON

| | | | |
|---|---|---|---|
| 15-3-8 | 1957-58 | Southern Oregon Sales, Medford, Oregon | $ 1,590 |
| | 1957-58 | Southern Oregon Sales, Central Point | 1,440 |
| | 1958-59 | Grange Co-op Supply, Central Point | 450 |
| | 1960-61 | Monarch Seed & Feed Co., Medford | 140 |
| | 1961-62 | Grange Co-op Supply, Ashland, Ore. | 640 |
| | 1961-62 | Grange Co-op, Central Point | 790 |
| | 1961-62 | Monarch Feed, Medford, Ore. | 620 |
| | 1962-63 | Grange Co-op, Ashland, Oregon | 790 |
| | 1962-63 | Monarch Feed, Medford, Oregon | 400 |
| | 1962-63 | Grange Co-op, Central Point | 910 |
| | | | $ 7,770 |

## JEFFERSON

| | | | |
|---|---|---|---|
| 16-3-33 | 1957 | Culver Seed, Culver, Oregon | $1,020 |
| | 1958 | Eastern Oregon Mills, Madras, Oregon | 810 |
| | 1958 | The Albert Dickinson Seed Co., Culver | |
| | 1961 | Eastern Oregon Mills, Madras | 1,690 |
| | 1961 | Central Farmers Fert. Co., Madras | |
| | 1962 | Eastern Oregon Mills, Madras | 910 |
| | 1962 | Round Butte Seed Growers, Culver | 2,510 |
| | | | $ 6,940 |

## KLAMATH

| | | | |
|---|---|---|---|
| 18-3-21 | 1958-59 | Malin Grain & Feed, Malin, Ore. | $ 284 |
| | 1958-59 | Simplot Soil Builders, Klamath Falls | 743 |
| | 1958-59 | Simplot Soil Builders, Malin | 141 |
| | 1959-60 | Malin Grain & Feed Co., Malin, Ore. | 252 |
| | 1961-62 | Simplot Soil Builders, Klamath Falls | 324 |
| | 1960-61 | Malin Grain & Feed Co., Malin | 492 |
| | 1961-62 | Malin Grain & Feed Co., Malin | 269 |
| | 1962-63 | Malin Grain and Feed Co., Malin | 1,843 |
| | | | $ 4,348 |

## LANE

| | | | |
|---|---|---|---|
| 20-3-98 | 1960-61 | Lane County Feed & Seed Co., Eugene | $ 1,040 |
| | 1960-61 | Gray's Feed & Seed, Springfield, Ore. | 1,210 |
| | 1960-61 | Farmers Whse. Inc., Junction City, Ore. | 650 |
| | 1962-63 | Lane County Feed & Seed, Eugene | 360 |
| | 1962-63 | Gray's Feed & Seed, Springfield | 390 |
| | 1962-63 | Eugene Farmers Co-op, Eugene | 450 |
| | 1962-63 | Everett Hunton Whse., Junction City | 450 |
| | | | $ 4,550 |

## LINN

| | | | |
|---|---|---|---|
| 22-3-38 | 1957 | Verl E. Nofziger, Lebanon, Oregon | |
| | 1957 | Peoria Seed & Grain Co., Fayetteville | |
| | 1957 | Albany Feed & Seed Co., Albany | |
| | 1957 | Robertson Feed & Seed, Sweet Home | |
| | 1957 | Grange Oil Co., Tangent | $ 5,120 |
| | 1958 | Webfoot Fertilizer Co., Albany | |
| | 1958 | Mullens Seed Store, Albany | |
| | 1958 | Albany Feed & Seed, Albany | |
| | 1958 | Victor Feed & Seed, Albany | |
| | 1958 | Webfoot Fertilizer Co., Albany | |
| | 1958 | Robertson Feed & Seed, Sweet Home | |
| | 1958 | Lebanon Feed & Seed Co., Lebanon | |
| | 1958 | Santiam Feed Store, Sweet Home | |
| | 1958 | Brownsville Feed & Seed, Brownsville | 1,260 |
| | 1959 | Robertson Feed & Seed, Sweet Home | |
| | 1959 | Lebanon Feed Co., Lebanon | 190 |
| | | | $ 6,570 |

## MALHEUR

| | | | |
|---|---|---|---|
| 23-3-37 | 1957-58 | Simplot Soilbuilders, Ontario, Oregon | $ 4,400 |
| | | Valley Wholesale Warehouse, Ontario | 4,230 |
| | | Ontario Produce Co., Ontario | 475 |
| | | Vale Packers Co-op, Vale | 475 |
| | | Vale Grain & Feed Co., Vale | 560 |
| | | Toblers Feed & Fuel Co., Nyssa, Oregon | 475 |
| | | Willow Creek Feed & Fuel Co., Nyssa | 560 |
| | | | $11,175 |
| | 1958-59 | Simplot Soilbuilders, Ontario | 2,280 |
| | | Valley Wholesale Whse. Co., Ontario | 425 |
| | | Ontario Produce Co., Ontario | 470 |
| | | Ontario Grain Co., Ontario | 10 |
| | | Vale Grain & Feed Co., Vale | 110 |
| | | Simplot Soilbuilders, Nyssa | 1,540 |
| | | | 4,835 |
| | 1959-60 | Ontario Grain Co., Ontario | 55 |
| | | Vale Grain & Feed Co., Vale | 40 |
| | | | 95 |

| | | | |
|---|---|---|---|
| | 1960-61 | Simplot Soil Builders, Ontario | 3,565 |
| | | Farmers Supply Co-op, Ontario | 8,060 |
| | | Simplot Soilbuilders, Vale | 1,695 |
| | | Simplot Soilbuilders, Nyssa | 615 |
| | | | 13,935 |
| | 1961-62 | Simplot Soilbuilders, Ontario | 130 |
| | | Farmers Supply Co-op, Ontario | 320 |
| | | | 450 |
| | 1962-63 | Farmers Supply Co-op, Ontario | 3,475 |
| | | | $33,965 |

## MARION

| | | | |
|---|---|---|---|
| 24-3-4 | 1962-63 | Meeker Fertilizer Co., Salem, Oregon | $12,570 |
| | | Meeker Fertilizer Co., Jefferson | 2,670 |
| | | Meeker Fertilizer Co., West Stayton | 2,950 |
| | | | $18,190 |

## MULTNOMAH

| | | | |
|---|---|---|---|
| 26-3-61 | 1957 | Oregon-Washington Fertilizer, Portland | |
| | | Wilbur-Ellis, Portland | |
| | | Webfoot Fertilizer, Portland | 6,665 |
| | 1957 | Gresham Berry Growers, Gresham, Ore. | 692 |
| | | | $ 7,357 |

## POLK

| | | | |
|---|---|---|---|
| 27-3-25 | 1960-61 | Central Farmers Fert. Co., Independence | $ 405 |
| | 1960-61 | Elliott Feed & Seed Co., Perrydale | 2,470 |
| | 1960-61 | Dallas Co-op, Dallas, Oregon | 1,970 |
| | 1962-63 | Elliott Feed & Seed Co., Perrydale | 2,250 |
| | | | $ 7,095 |

## UMATILLA

| | | | |
|---|---|---|---|
| 30-3-20 | 1962-63 | Pendleton Grain Growers, Hermiston | $ 625 |

## UNION

| | | | |
|---|---|---|---|
| 31-3-32 | 1957-58 | H. L. Wagner & Son, Imbler, Oregon | $ 250 |
| | 1960-61 | Pioneer Flouring Mills, Imbler, Ore. | 480 |
| | 1961-62 | Pioneer Flouring Mills, Island City | 120 |
| | 1962-63 | Pioneer Flouring Mills, Imbler, Ore. | 590 |
| | 1962-63 | Pioneer Flouring Mills, Island City | 320 |

| | | | |
|---|---|---|---|
| | | | $ 1,760 |
| 31-3-56 | 1963-64 | Pioneer Flouring Mills, Imbler<br>Pioneer Flouring Mills, Island City | |
| | | **WASHINGTON** | |
| 34-3-19 | 1957-58 | Eishen Grain & Feed, Cornelius | $ 490 |
| | 1957-58 | Tualatin Valley Co-op, Hillsboro | 270 |
| | 1957-58 | DeFrees and Son, North Plains, Oregon | 520 |
| | 1958-59 | Gaston Feed Co., Gaston | 360 |
| | 1960-61 | Webfoot Feed Co., Banks | 410 |
| | 1962-63 | Webfoot Feed Co., Banks | 470 |
| | 1962-63 | Farmers Feed & Supply, Forest Grove | 450 |
| | | | $ 2,970 |
| | | **YAMHILL** | |
| 36-3-26 | 1957-58 | Farmers Co-op of Yamhill, McMinnville | $ 510 |
| | 1957-58 | Bernard Madesen Grain, Carlton, Oregon | 40 |
| | | | 550 |
| | 1958-59 | Albers Farm Store, McMinnville, Ore. | 70 |
| | 1960-61 | Bernard Madsen Grain Co., Carlton | 490 |
| | | Central Farmers Fertilizer Co., Amity | 1,200 |
| | | Central Farmers Fertilizer Co., Dundee | 660 |
| | | George S. Zimmerman Grain, Yamhill | 1,200 |
| | | Buchanan Cellers Grain Co., McMinnville | 410 |
| | | St. Paul Feed & Supply, Newberg, Oregon | 660 |
| | | | $ 4,530 |
| | 1962-63 | George S. Zimmerman Grain, Yamhill | 400 |
| | | Chehalem Valley Mills, Newberg | 520 |
| | | | 920 |
| | | | $ 6,070 |

## EXHIBIT 2

Exhibit 2 is the Opinion and Order of the State Tax Commission and is set forth in Appendix A at page 1A.

# EXHIBIT 3

## CONSIGNMENT CONTRACT

_____ 19____

To _____

DISTRIBUTOR

We hereby agree to consign to you for sale, for our account, such quantities and grades of fertilizers, fertilizer materials and agricultural chemicals as may be mutually agreed upon from time to time (all such goods covered by this contract being hereinafter called "the consigned goods"), upon the terms and conditions hereinafter set forth, to each and all of which the parties hereto do hereby mutually agree:

1. SALES. You agree diligently to seek business and create demand for our goods. We will designate in writing, our prices to you for the consigned goods, all and each of which shall be subject to change by us, from time to time, on the receipt of written notice by you.

2. WARRANTY. It is agreed between us, and in making any and all sales of the consigned goods, you shall expressly stipulate:

(a) That every shipment or sale is made with a guarantee only as to the analysis printed upon sacks, packages, labels or tags; that there is no other guarantee or warranty, express or implied, of any of the consigned goods or of the results to be obtained from their use; that in the event any discrepancy in the analysis shall be proven, damages shall be limited to the difference between the com-

mercial value under the guaranteed analysis and the value under the actual analysis of the goods received, and no other remedy or defense shall be allowed;

(b) That all claims must be presented within ten days after delivery and a reasonable opportunity for inspection afforded before use, otherwise we will be released from all liability whatsoever; and

(c) That we shall not be liable for failure or delay in deliveries due, in whole or in part, to any cause or condition beyond our reasonable control.

3. SETTLEMENT AND ACCOUNTING. You agree to maintain separate, full and complete books, records, accounts and inventories covering the consigned goods and sales thereof, and we shall have the right to inspect or copy the same at all reasonable times. On or before the 5th day of each month you will submit to us a verified statement showing: (a) the total quantity of each type of the consigned goods which you actually had on hand on the last day of the month covered by such statement; (b) the locations at which said goods were stored and the quantities of each type of such goods as were actually on hand on that date at each location; and (c) the date and quantity of each sale of each type of the consigned goods made during the month covered by such statement. Promptly upon receipt of such statement we will invoice you as of the last day of the preceding month for goods sold during that month, at the prices in effect at the time of each sale, and you agree to pay all such invoices in full (without regard to the terms of any sales made by you), without deduction or offset, on the due dates of the payment terms stated thereon. All in-

voices not paid at due date shall bear interest at the rate of 6% per annum until paid.

4. STORAGE. You agree to unload promptly and keep clear of demurrage and to keep securely housed and cared for in your own warehouse, all goods consigned to you hereunder, without cost or charge to us, and to pay us in full the price to you currently in effect for all loss of or damage, other than loss or damage caused by fire, to any of the consigned goods while in your charge. Upon demand, you agree to deliver to us, in good condition, free from expense, at the railroad station nearest the location of such goods or at our option, at the warehouse where the goods are stored, any of the consigned goods for which we have not received payment in full. It is understood and agreed that at all times we shall have the right to inspect any and all of the consigned goods at such location or locations as they may be stored and to retake possession of part or the whole of the said goods.

5. STORAGE WITH DEALERS. It is understood that, if and when one of your dealers shall sign this agreement and an original thereof as so executed shall have been filed with us, you may store all or any portion of the consigned goods with such dealer. By signing this agreement, such dealer is and shall be jointly and severally liable with you to us to observe and perform each and all the terms and conditions which you are herein required to observe or perform.

6. TITLE. Title to the consigned goods shall remain in us until the goods are sold in the ordinary course of business as authorized herein or until they are paid for by you. You shall not have any lien of

any kind upon the consigned goods or any property of any kind belonging to us which may come under your possession or control. Any taxes which may be levied or assessed against the consigned goods shall be paid by us.

7. RESPONSIBILITY. You shall deal with your customers in your own name and on your own responsibility. Our responsibility is to you only and not through you to others, and we are not responsible for your acts or omissions in dealing with your customers or with third parties. You agree to defend, indemnify and hold us harmless of, from and against any loss, damage, expense or liability, whether real or claimed, arising directly or indirectly from your acts or omissions, or the acts or omissions of your agents, employees or representatives, in connection with the sale or other disposition by you of the consigned goods.

8. STATUTORY ENACTMENTS AND INDEMNITY. You hereby expressly agree that in making sales of our goods you will be bound by and comply with any and all governmental laws, rules, regulations or ordinances whatsoever, which are now or may hereafter be in effect, and you agree to defend, indemnify and hold us harmless of, from and against any loss, cost, damage or liability, whether real or claimed, resulting in whole or in part from your breach of or failure to comply with any of the provisions of this agreement.

9. CONTINGENCIES. We shall not be liable in any respect for our failure or delay in the fulfillment or performance of this agreement, or of any sales or orders taken hereunder, if such fulfillment or performance is prevented or hindered, directly or indirectly, by any cause or agency, of

any kind whatsoever, which is beyond our reasonable control.

10. DURATION AND TERMINATION. This agreement shall remain in effect until cancelled at any time by written notice from one party to the other. Upon the termination hereof, the provisions of this agreement shall govern all unfinished business, and any such termination shall be without prejudice to our rights hereunder against you upon your then existing obligations and liabilities. We reserve the right to withhold further deliveries to you, without notice, in case of any report or occurrence regarded by us as unfavorable to your credit or in the event of any breach of this agreement by you.

Cominco Products, Inc.
By Its Agent
BALFOUR, GUTHRIE & CO., LIMITED
Per .....

Accepted ....., 19...
.....
DISTRIBUTOR
By .....

The undersigned dealer has read the foregoing agreement, including paragraph 5 thereof, and hereby accepts and agrees to be bound directly to Cominco Products, Inc., for the full performance of the same except that the hereinbefore named distributor shall designate to me his prices for the consigned goods.

.....

EXHIBIT 4

BALFOUR, GUTHRIE & CO., LIMITED
733 S.W. Oak Street
Portland, Oregon

FERTILIZER DIVISION

Exclusive U. S. Fertilizer Sales Agents for
COMINCO PRODUCTS, INC.
ELEPHANT BRAND FERTILIZERS
April 5, 1957

TO OUR BUYERS:

Dear Sirs:

CONSIGNMENT WAREHOUSE STOCKS

We would like to remind you that this is an opportune time for your customers to start using their warehouse stocks, rather than order Fertilizers for direct shipment.

As you are aware the demand is at the peak, and it is to buyers' advantage to draw their requirements from consigned stocks, rather than hold same in reserve for later use. This will insure their having the material available when needed, rather than having to await arrival of shipments.

We shall appreciate your contacting all your dealers and urging them to follow this procedure.

Please also remind them of the importance of sending in stock reports as of the 25th of each month. We should have these reports in our hands by the fifth of the following month.

With regard to Receiving Reports, these should be sent in as soon as cars have been unloaded and checked by the warehouse concerned.

While we have no definite date for clearing up consigned stocks, it is expected that they will be used or paid for by May 15th.

Your cooperation in these matters will be greatly appreciated.

Yours very truly,
BALFOUR, GUTHRIE & CO., LIMITED
By HUGH H. TEMPLETON

OREGON TAX COURT
Property Tax
No. 154

| | |
|---|---|
| COMINCO PRODUCTS, INC., *Plaintiff,* v. STATE TAX COMMISSION, *Defendant.* | COMPLAINT for Cancellation of Personal Property Tax Assessments for the Year 1957-1958 and for Refund of Taxes Paid . . . Multnomah County . . . |

COMINCO PRODUCTS, INC., hereinafter called "CPI", alleges as follows:

I.

At all times mentioned, CPI was and is a corporation existing under the laws of Washington and was and is duly authorized and qualified to transact business as a foreign corporation in Oregon.

II.

CPI is aggrieved by and directly affected by Opinion and Order No. VL 64-158 issued by the State Tax Commission on September 15, 1964, copy of which is attached hereto and marked Exhibit A and by reference incorporated in this complaint. Copy of the Order was served on CPI on September 16, 1964.

III.

On January 1, 1957 CPI was engaged in the importation of fertilizers from Canada into Oregon for sale. On that date, CPI owned, free and clear of all liens and encumbrances, fertilizers in Multnomah County in the following locations, which were assessed in the amounts set forth:

| | |
|---|---|
| Oregon-Wash. Fertilizer Co., Portland<br>Wilbur-Ellis Co., Portland<br>Webfoot Fertilizer Co., Portland | $6,665 |
| Gresham Berry Growers, Gresham, Ore. | 692 |
| | $7,357 |

IV.

All fertilizers were manufactured in Canada and were imported into Oregon by CPI for sale. Fertilizers were in warehouses of the dealers above named and were held by such dealers for the account of CPI under the provisions of a Contract of Consignment.

V.

Fertilizers had not been sold, nor had CPI been paid therefor, and all fertilizers were in the original bags and in the original form in which they were imported.

VI.

CPI duly protested the acts of the county officials in assessing such property and appealed the assessments to defendant.

VII.

Defendant's Opinion and Order should be reversed for the following reasons:

a) The property is not taxable by the State under the Import-Export Clause of the United States Constitution, Article I, Section 10.

b) The property is not taxable by the State under the provisions of Oregon law and the rulings of defendant. O.F. 81-V October 5, 1955, LSA 307.030 Page 1.

c) Defendant erred in disregarding the consignment transaction and holding that there was a sale by CPI to the dealers.

WHEREFORE, plaintiff prays for a Judgment reversing Opinion and Order VL 64-158, striking the assessments of CPI's property in full, declaring that such property is not taxable under Article I Section 10 of the United States Constitution, ordering a refund of taxes paid on such assessments, together with interest at the rate of 6% per annum from the date paid until refunded, ordering a correction of all records to reflect the determination of the Court, and for such other relief as may be found to be just.

PHILLIPS, COUGHLIN, BUELL & PHILLIPS

By s/ ALFRED H. STOLOFF
807 Electric Building
Portland, Oregon 97205
CA 2-9821
Attorneys for Plaintiff

Verification Omitted

STATE OF OREGON
STATE TAX COMMISSION

In the Matter of the Appeal of COMINCO PRODUCTS, INC. from acts of the Sheriff and Tax Collector of Marion County, Oregon, for the year 1962-1963. ) No. 24-3-4

## PETITION

Comes now COMINCO PRODUCTS, INC., hereinafter sometimes called "CPI" and now appeals to the State Tax Commission from the acts of the Sheriff and Tax Collector of Marion County, Oregon in placing personal property on the Assessment and Tax Rolls of such county for the year 1962-1963 purportedly under ORS 311.210, and represents and shows:

1. CPI is a corporation duly organized and existing under the laws of Washington, having its principal place of business in Spokane, Washington.

2. On January 1, 1962 CPI owned an inventory of fertilizer located on premises of Meeker Fertilizer Co. (hereinafter sometimes called "Meeker") in Marion County, Oregon of the total value of $109,525.01, of which $72,779 was in the bulk and $36,746.01 was in bags.

3. Such fertilizer was shipped by CPI to Meeker from Canada for sale by Meeker under the provisions of a contract of consignment, a sample copy of which is attached hereto, marked Exhibit "A" and by reference made a part hereof.

4. On January 1, 1962 such fertilizer had not been sold or otherwise disposed of by CPI through Meeker nor had CPI been paid therefore and all such fertilizer was in the original form and in the original package in which it was imported by CPI. CPI had not hypothecated or otherwise dealt with such fertilizer from the time of importation to January 1st, 1962.

5. Petitioner objects to the action of the Sheriff and Tax Collector in placing such property on the Assessment and Tax Rolls of said County on the grounds, among others, that such property is immune from assessment and taxation under the provisions of Article I Section 10 of the Constitution of the United States, ORS 307.030 and other applicable statutes of this State and the rules, regulations and opinions of the Oregon State Tax Commission.

WHEREFORE, petitioner prays for an order setting aside and canceling such assessments and any tax based thereon and for a refund of any sum which may hereafter be paid thereon, together with interest.

PHILLIPS, COUGHLIN, BUELL & PHILLIPS

By s/ ALFRED H. STOLOFF
Attorneys for Petitioner
807 Electric Building
Portland 5, Oregon
CA 2-9821

Verification Omitted.

DENVER YOUNG
Sheriff and Tax Collector
For Marion County
Salem, Oregon
March 4, 1963

Attn: Stuart W. Gates

Cominco Products Company
%Phillips, Coughlin, Buell & Phillips
Electric Building
621 S. W. Alder Street
Portland, Oregon

Dear Mr. Gates:

Please be advised that the letter of February 11, 1963, from Alfred W. Stoloff concerning inventory of Cominco Products, Inc. did not show sufficient cause why this inventory should not be added to the tax rolls pursuant to our letter dated February 7, 1963, and mailed from this office on February 7, 1963. We have been advised to add the inventory of Cominco Products, Inc. to the 1962-63 tax rolls as follows:

| Code Area | Assessed Value |
|---|---|
| 01-024-00 | $21,760.00 |
| 13-014-00 | 2,670.00 |
| 50-061-04 | 2,950.00 |

The following provisions of law are called to your attention:

ORS 311.210— ". . . Appeal may be taken from the action of the officer in making the correction or addition by the person aggrieved within thirty days after the action of such officer is taken, by giving notice to such officer and otherwise proceeding in the manner pro-

vided for appeals from the board of equalization."

ORS 306.515— "Any taxpayer . . . may appeal from the order of said board to the state tax commission by filing with the county clerk a written notice of appeal in duplicate. Such notice . . . shall be verified by the oath of the petitioner or his attorney. The notice of appeal shall state the specific grounds for appeal, and there shall be attached thereto a detailed statement of the facts relating to the description, assessment and valuation of the property affected.

Yours truly,

DENVER YOUNG
Sheriff and Tax Collector
By H. T. EVANS
H. T. EVANS
Chief Tax Deputy

February 11, 1963

Mr. Denver Young
Sheriff and Tax Collector
Marion County Courthouse
Salem, Oregon

Attention: H. T. Evans, Chief Tax Deputy
Re: Cominco Products, Inc. Inventories
of fertilizer 1962-1963

Dear Mr. Young:

We have received a copy of your letter dated February 7, 1963 giving notice of intention to assess and tax inventories of fertilizer owned by Cominco Products, Inc. and located on January 1, 1962 at Meeker Fertilizer Company premises in Marion County, Oregon.

The fertilizer was owned and shipped by Cominco from points outside the United States to Meeker for resale for the account of Cominco under a written consignment contract in which Cominco retained title, ownership, control and risk of loss of the goods until sold, for its account. On January 1, 1962, the fertilizer was in the original form or packages in which it was imported. The property is exempt from state taxation under the provisions of Article I Section 10 of the United States Constitution, the various statutes of this state providing for assessment and taxation of property, and OF 81-V dated October 5, 1955 which appears in the Cumulative Edition of the Law Section Abstracts of the Oregon State Tax Commission Valuation Division at 307.030, page 1. The title of the opinion is "Imported Fertilizer which is in sacks in which it was imported is in its original package and hence not subject to taxation".

This letter constitutes our appearance as attorneys for Cominco in accordance with your letter of February 7th and constitutes a showing of cause why such property should not be added to the assessment and tax rolls.

Please advise us of what further action, if any, is taken with respect to such property.

Very truly yours,

PHILLIPS, COUGHLIN, BUELL & PHILLIPS
ALFRED H. STOLOFF

DENVER YOUNG
Sheriff and Tax Collector
For Marion County
Salem, Oregon
February 7, 1963

Cominco Products Inc.
% Ray, J. D., Sec. & Treas.
993 W. 3rd Avenue
Spokane 4, Washington

Dear Sir:

A recent check by the Oregon State Tax Commission reveals that there were certain items of inventory owned by you, located in Marion County which was subject to personal property tax as of January 1, 1962. This inventory consists in values of $87,037.73 in Salem, $10,698.64 in Jefferson, and $11,788.64 in West Stayton. This office has been directed by the County Assessor's office to place this personal property upon the 1962-63 tax roll with assessed values of $21,760.00, $2,670.00 and $2,950.00 respectively. Therefore, in accordance with ORS 311.210 this property will be added to the 1962-63 tax rolls.

Please take notice that you are hereby required to appear at this office on or before February 27, 1963 to show cause, if any, why such property should not be added to the said assessment and tax rolls.

Upon failure to appear at the time and place specified such property shall be added to said assessment and tax rolls forthwith.

Yours truly,

DENVER YOUNG
Sheriff and Tax Collector

By H. T. EVANS
H. T. EVANS
Chief Tax Deputy

Office of
H. F. DOMOGALLA
Assessor
Salem, Oregon

Dec. 31, 1962

Cominco Products, Inc.
c/o Mr. J. D. Rae
933 West 3rd Avenue
Spokane, Wash.

Dear Sir:

Oregon State Auditors report for 1962 disclosed a valuation of inventory, namely fertilizer, stored at Meeker's Fertilizer Plant in Salem as of Jan. 1, 1962 belonging to Cominco Products, Inc.

On Dec. 17, 1962 this office mailed a Return of Assessable Personal Property form to you requesting that the original copy be returned to this office, bearing your signature as secretary-treasurer. To date we have not received it, therefore your kind attention is urgently requested toward a prompt mailing of that subject matter.

Yours truly,

H. F. DOMOGALLA
Marion County Assessor
By H. E. ROHLAND
Deputy Personal Property
Assessor

## APPENDIX C

MANDATE AND DECREE

IN THE OREGON TAX COURT
Property Tax
No. 154

| | |
|---|---|
| COMINCO PRODUCTS, INC., *Plaintiff,* | FILED Mar. 31, 1966 TINA H. THOMAS Deputy Clerk |
| vs. | |
| STATE TAX COMMISSION *Defendant.* | |

AMENDED ORDER ENTERING MANDATE AND DECREE

On the Court's motion, and at the direction of the Supreme Court as set forth in its Mandate issued herein on March 24, 1966,

IT IS HEREBY ORDERED by the Court that said Mandate be entered herein, being in words and figures as follows:

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 4th day of OCTOBER 1965, WHEREUPON on this WEDNESDAY, the 9th day of FEBRUARY 1966, the same being the 57th judicial day of said term, when the following proceedings were had:

| | | |
|---|---|---|
| COMINCO PRODUCTS, INC., *Respondent* | ) | Appeal from |
| v. | ) | OREGON |
| STATE TAX COMMISSION, *Appellant* | ) | TAX COURT |

This cause on January 7, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reversed for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of the court below rendered in this cause be and the same hereby is in all things reversed and set aside.

IT FURTHER IS ORDERED that appellant have and recover of and from respondent its costs and disbursements in this court taxed at $80.01.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

STATE OF OREGON, )
)ss.
County of Marion, )

I, F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of DECREE has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of such original, as

the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, Mar. 24, 1966.

F. M. SERCOMBE
Clerk of Supreme Court,
State of Oregon

TO THE TAX COURT
OF THE STATE OF OREGON

You are hereby commanded that of the above judgment order of our Supreme Court you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Supreme Court, and to law and justice shall appertain.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, Mar. 24, 1966.

F. M. SERCOMBE
Clerk of Supreme Court,
State of Oregon

Pursuant to the provisions of said Mandate,

IT IS HEREBY FURTHER ORDERED, CONSIDERED AND DECREED by the Court;

1. That the Decree of this Court previously entered herein on the 9th day of June, 1965, be, and it hereby is

in all things reversed and set aside; and

2. That defendant-appellant have and recover of and from plaintiff-respondent its costs and disbursements in the Supreme Court taxed at $80.01.

Given and made at Salem, Oregon, this 31st day of March, 1966.

/s/ EDWARD H. HOWELL
Judge